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No. 08-1504

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

ANNEMARIE BOTHE,

Petitioner,

v.

PAMELA JEAN HANSEN,

Respondent.

On Petition For A Writ Of Certiorari To The Second District Court Of Appeal For The State Of Florida

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner presents no "compelling reasons" for the Court to grant its Petition for a Writ of Certiorari ("Petition"). *See* Supreme Court Rule ("Sup. Ct. R.") 10. The Florida District Court of Appeal for the Second District's ("Second District") opinion was a unanimous *per curiam* decision of a three-judge panel affirming a final summary judgment in Respondent's favor by the Circuit Court in and for Sarasota County ("Circuit Court"). There is no conflict with any decision of another United States Court of Appeals on the same matter. The Second District did not decide an important federal question that conflicts with a decision by a state court of last resort or of a United States Court of Appeals. Nor did the Second District decide an unsettled but important question of federal law. Sup. Ct. R. 10(a), (b) and (c).

In her attempt to identify an issue meriting this Court's attention, Petitioner has worded the questions presented by utilizing broad assertions implicating procedural and substantive due process and equal protection of the laws. There is no constitutional issue here; nor is there any issue of considerable national importance. Instead, the Second District's decision was based upon independent and well-established state law grounds over which this Court lacks jurisdiction. The Second District followed and applied well-established Florida case law regarding the disposition of a decedent's Individual Retirement Account (IRA) proceeds. The resolution of this question by the Circuit Court, and then the Second

District, is of no general importance to the development of the law or to other cases. Florida appellate courts are consistent in their approach to this issue. None of the criteria warranting this Court's review is present in this case. Therefore, the Petition should be denied.[1]

COUNTER-STATEMENT OF THE CASE

This case involves a claim by Petitioner that Respondent, Pamela Jean Hansen, is not entitled to receive the decedent's (IRA) proceeds pursuant to her designation as primary beneficiary.

Respondent is the former wife of the decedent, Andreas David Bothe. The marriage was long-term, (39 years), which ended in dissolution on March 15, 2006. (R. 45). The final judgment of dissolution ratified a Marital Settlement Agreement, (MSA) executed on February 21, 2006. (P. 1a-6a). Under the description of items husband was to receive, the MSA included his retirement plan in the amount of $1,089,546. (R. 40; P. 4a). The MSA did not contain any express language concerning the disposition of the decedent's IRA, except for its inclusion in the list of assets.

[1] References to Petitioner's Petition for Writ of Certiorari will be as (P. ___) followed by a page number. References to the Record on Appeal will be as (R. ___) followed by a page number. References to the transcript of the summary judgment hearing will be as (T. ___) followed by a page number.

There was no requirement in the MSA for either party to re-designate or change IRA beneficiaries. (P. 1a-6a). There was no provision specifically referring to a release or waiver of either party's rights as a named beneficiary in the IRA. (P. 1a-6a).

When the decedent first opened his IRA account in October, 1998 with Donaldson, Lufkin & Jenrette Securities Corporation, a DLJ *direct* account, he designated Respondent, (then Pamela Jean Bothe), as the primary beneficiary, and Petitioner, Annemarie Bothe, his sister, as the contingent beneficiary. (P. 9a-10a). E*Trade Financial Corporation, (hereinafter referred to as E*Trade), assumed the IRA account sometime around January or February of 2006. (R. 2, 15, 268). E*Trade's own pleadings asserted that it was the custodian of the IRA account of the decedent. (R. 793).

The decedent passed away on March 22, 2006, without having made any change to the IRA's beneficiary designation form. E*Trade did not receive any communication from the decedent concerning any change to his beneficiary designation. (R. 16). Respondent requested that E*Trade pay over the proceeds of the IRA to her in accordance with the beneficiary designation. E*Trade did not assert any claim to the IRA account, but would not release the funds without a court order, and demanded that an action be brought to determine the rights and obligations of the parties. (R. 3, 4, 16).

This action commenced in the Circuit Court with the filing of Respondent's complaint for declaratory relief against Petitioner and E*Trade. (R. 1-14). She sought a declaration that she was entitled to receive the IRA proceeds pursuant to her designation as primary beneficiary. (R. 4). Petitioner was named as a party as she may have asserted an interest in the account. (R. 3, 16). The complaint alleged that the decedent had established an IRA account on October 5, 1998, which was later assumed by E*Trade, and assigned E*Trade account number [Financial Account Number Omitted]. (R. 2). E*Trade's answer admitted that allegation to be true. (R. 15). The decedent's own correspondence of March 21, 2006 referred to his IRA as an E*Trade account and provided the account number. (R. 502). Petitioner responded to the complaint and counter-claimed for declaratory relief. (R. 27-45).

Respondent filed a motion for summary judgment, asserting the absence of genuine issues of material fact. (R. 91-114). It was uncontroverted that the decedent established an IRA account on October 5, 1998 and the designated primary beneficiary on the IRA Application and Adoption Agreement was Respondent. (R. 92, 6, 36; P. 9a-10a). It was undisputed that the MSA listed the IRA as decedent's asset and did not contain any express language directing the re-designation of named beneficiaries. (R. 92, 8-14, 38-44; P. 1a-4a). The decedent died on March 22, 2006 without formally changing the named beneficiaries on his IRA, nor did he ever provide

Respondent or E*Trade with the forms which would have been required to change the designated beneficiaries. (R. 93, 31, 16).

The substantive issue of law argued in support of the summary judgment motion was whether, based on the undisputed facts, the bright line rule of *Luszcz v. Lavoie*, 787 So.2d 245 (Fla. 2d DCA 2001) applied. That case held that upon the death of an IRA owner, the institution holding the funds need look no further than the IRA contract to determine the beneficiary. Conspicuously absent from Petitioner's Petition is any mention of the controlling state appellate decision that governed the outcome of this case.

In opposition to Respondent's motion, Petitioner argued that an issue of fact existed as to whether E*Trade was acting as the custodial agent for the decedent as to the IRA. (R. 756; T. 874). She argued that an issue of fact existed as to whether E*Trade's IRA agreement, produced by E*Trade in discovery, controlled the change of beneficiary designation. (R. 762, 111; T. 874).

The Circuit Court heard oral argument on the motion for summary judgment. Respondent again argued that this action was directly controlled by *Luszcz v. Lavoie*. Since the decedent died without having sent a beneficiary designation change to E*Trade, and the IRA had been distributed to him in the MSA to do with as he pleased, the proceeds were payable, as a matter of law, to Respondent. E*Trade never received any communication from Mr. Bothe

before his death concerning any change to his beneficiary designation.

The Circuit Court entered a final summary judgment ruling that *Luszcz v. Lavoie*, 787 So.2d 245 (Fla. 2d DCA 2001) was dispositive of the issues in this dispute. (P. 22a). Consistent with that ruling, it found that Respondent was entitled to all the proceeds from decedent's E*Trade IRA account. (P. 23a). The Circuit Court considered and rejected Petitioner's arguments that Respondent was not entitled to the IRA proceeds.

Petitioner appealed the Circuit Court's judgment to the Second District. The issues were fully briefed and orally argued before a three-judge panel. On November 7, 2008, the Second District affirmed the Circuit Court *per curiam*. (P. 19a). Petitioner filed a motion for rehearing, rehearing *en banc*, and request for a written opinion which was denied by the District Court. (P. 24a).

Petitioner's Statement of Case relied upon a September 2002 letter from Harris*direct* to the decedent regarding some administrative changes to his IRA. (P. 10, 12). That letter was not before the trial court for consideration at the time of the hearing which resulted in the order on review, and therefore, was properly not included by the Circuit Court Clerk in the preparation of the record on appeal. Petitioner filed a motion in the Second District to supplement the record with that letter, which was denied. (P. 20a). Fla. R. App. P. 9.200(f) contemplates supplementing

the record with documents if there is an error or omission in the record, or the record is incomplete. It does not contemplate supplementing the record with documents that were not considered by the decision-maker in rendering his order. The September 2002 letter was an item listed on Petitioner's Supplemental Exhibit List, filed two days after the hearing on the motion for summary judgment. The Exhibit List was prepared in contemplation of trial, which did not ultimately take place because the case was disposed of on summary judgment. The fact that the letter was deemed to be a possible exhibit at trial did not convert it into evidence that was admitted by the trial court for its consideration in rendering its judgment. Hence, there was no error in the denial of the motion to supplement the record.

Even if the contents of the Harris*direct* letter were considered, it would not have affected the outcome and therefore, was not necessary to a fair determination of the case. By the time of decedent's death, E*Trade was the IRA's custodian, having acquired Harris*direct*'s accounts. After E*Trade took over, it provided an IRA agreement stating a designation of a beneficiary may only be made on a form provided by or acceptable to E*Trade. E*Trade never communicated to Mr. Bothe that the designation form it had was not acceptable to it.

Petitioner suggested that E*Trade would have sent any requirements for changing the IRA beneficiary to the marital home, which Mr. Bothe had moved out of in anticipation of divorce. (P. 10). This

suggestion ignores the fact that Mr. Bothe carried on business, and had a course of dealing, with E*Trade after it assumed the maintenance of his accounts. He contacted E*Trade with instructions after the separation in 2005, when he and Respondent decided to split the stock account held by the Bothe Family Revocable Trust as part of their marital distribution. That is reflected by the $253,193 figure in the MSA for each of them. (P. 3a, 4a). Just prior to his death, he identified the IRA as an E*Trade account, using the E*Trade account number. (P. 15a). Mr. Bothe was a savvy businessman, and had been a licensed life insurance agent in California, owning his own insurance agency. If Mr. Bothe wanted to change the beneficiary of his IRA, he had ample opportunities to do so. By the same token, if E*Trade was unhappy with the beneficiary designation form, it had many opportunities to communicate with Mr. Bothe about it during their discussions of other transactions.

In an effort to distract the Court from the well-established rule of state law that controls the outcome of this case, Petitioner relied on an unwitnessed document entitled "last will and testament" dated March 21, 2006, which was of no legal effect under Florida law, as well as a letter to Margaret Lindsey of the same date. (P. 8, 15a-18a). Neither of these documents, provided to third parties and not to E*Trade, qualified as a beneficiary change governing E*Trade's distribution of the IRA proceeds.

In a feeble attempt to elevate its disagreement with the Circuit Court's judgment, which was affirmed

by a three-judge panel of the District Court after oral argument, to one worthy of this Court's review, Petitioner criticized the Circuit Court's judgment because it characterized Petitioner as decedent's personal representative, which she was not. (P. 11, 23a). This characterization had no impact on the conclusion reached that Petitioner was not entitled to recovery under her counter-claim. The Circuit Court's decision had nothing to do with either party's capacity as personal representative. If that language was excised as surplusage, the effect of the judgment would not have been altered. It was immaterial to the result and therefore, harmless.

As a further attempt to discredit the Circuit Court's ruling, Petitioner stated the judgment erroneously found that the MSA identified the IRA as an account with E*Trade. (P. 11, 21a-22a). Again, this had no effect on the result because there was never any confusion about the identity and the holder of the IRA account. In the MSA, it was identified as a retirement plan, and the exact amount of the account of $1,089,546 was entered. (R. 10; P. 4a). The E*Trade IRA was the only account that held that amount of money. E*Trade's own pleadings admitted it was the custodian of the account, and the decedent's correspondence a day before his death referred to his IRA as an E*Trade account and provided the E*Trade account number. (R. 15, 502; P. 15a).

Upon the Second District's denial of Petitioner's motion for rehearing, rehearing *en banc* or for a written opinion, she sought review in this Court.

REASONS FOR DENYING THE WRIT

1. Florida's Second District Afforded Petitioner Procedural Due Process By Providing An Opportunity to be Heard at a Meaningful Time and in a Meaningful Manner.

Petitioner does not contend that the decision of the District Court creates any circuit court of appeals conflict or that it decided an important federal question that has not been settled by this Court. Instead, she argued that by refusing to supplement the record on appeal with the September 2002 letter, the District Court denied her procedural due process.

As a preliminary matter, whether any procedural protections are due depends on whether the individual will be condemned to suffer grievous loss. *Morissey v. Brewer*, 408 U.S. 471, 481 (1972).[2] In this case, Petitioner was not the individual who would suffer any loss, in that if her position had been adopted by the lower courts, she would not have received the IRA proceeds. If she had prevailed, the courts would have

[2] In *Morissey*, this Court held that before parole could be revoked, minimal due process required a preliminary hearing to determine probable cause to be conducted promptly at a convenient place.

nullified the beneficiary designation naming her as contingent beneficiary, and then would have turned the proceeds over to Margaret Lindsay.

Petitioner argued that by seeking supplementation of the record at the appellate level, she did what she could have to assert her due process rights. (P. 20). Respondent respectfully disagrees. Since review of a state-court judgment is being sought, Sup. Ct. R. 14.1(g)(i) requires a Petitioner's statement of the case to contain specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears, so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. The Petition does not contain the specific statements because the constitutional issues raised are being raised for the first time herein, which must not be permitted. *See United States v. Bean*, 537 U.S. 71, 75, n.2 (2002) (holding argument was waived because it was raised "for the first time in his brief on the merits to this Court."). Petitioner's motion for rehearing, rehearing *en banc* and for a written opinion filed in the District Court complained about the failure to supplement the record on appeal, but did not specifically assert a denial of procedural

due process or otherwise raise any federal questions. Instead, she relied on decisions from Florida appellate courts which decided the state law issue regarding supplementation of the record. Therefore, this Court should not consider the merits of this constitutional argument as a basis for the exercise of its certiorari jurisdiction.

Procedural due process demanded by the Florida and Federal Constitutions contemplates fair notice and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Even if Petitioner was the individual entitled to procedural due process, and even if this Court does not consider the argument to be waived, she had reasonable notice of the matters placed at issue by the pleadings, including Respondent's motion for summary judgment. Petitioner was given, and took advantage of, every opportunity to appear, argue the issues presented by her defenses and counter-claim, and otherwise protect her interests. The Circuit Court's judgment did not rule on any issues outside the scope of the pleadings and arguments. It simply fulfilled its duty to apply the correct principle of law to the facts.

Petitioner asserted the September 2002 letter of Harris*direct* created an issue of fact as to whether decedent's IRA plan and beneficiary designation was revoked. (P. 14-15). As a result, she argued, the denial of the opportunity to supplement the record on appeal with that letter denied her procedural due process by constricting the evidence helpful to show the IRA plan was no longer in effect. (P. 15-16).

Procedurally, there was no error in the denial of the motion to supplement the record. The letter was not evidence admitted by the trial court for its consideration in rendering its Final Judgment. A party is not entitled to a trial on the possibility that an issue of material fact might turn up at the trial. Petitioner's attack on the Final Judgment would, if entertained as valid, prevent any summary judgment and render the summary judgment rule a nullity, since there would be no conceivable summary judgment that could not be similarly attacked. The Second District correctly applied Fla. R. App. P. 9.200(f) in denying, in part, Petitioner's motion to supplement the record, in that the rule contemplates supplementing the record with documents if there is an error or omission in the record, or the record is incomplete. It does not contemplate supplementing the record with documents that were not considered by the trial judge in rendering his judgment. The Second District simply followed Florida's familiar procedure and practice in the administration of its appellate rule, a matter reserved to the states.

Substantively, the letter would not have affected the outcome, and therefore, was not necessary to a fair determination of the case. The issues raised by Petitioner regarding the mergers between brokerage houses after the IRA account was opened were thoroughly addressed in the briefs and at oral argument. The decedent, a sophisticated retired businessman, carried on business directly with E*Trade after it assumed maintenance of his various accounts. There

was a course of dealing on an ongoing basis between E*Trade and Mr. Bothe. He communicated instructions to E*Trade regarding his accounts, which E*Trade acted upon. E*Trade had ample opportunities to object to the beneficiary designation form if it was unacceptable to it. It never did; nor did Mr. Bothe ever change the named beneficiary on the form. Banks and brokerage houses merge all the time without any meaningful legal change to the accounts assumed and without voiding previously executed beneficiary designation forms. Accordingly, there was no point in trying the issue raised by the letter. The Circuit Court had the complete establishment of the facts necessary for the application of controlling state law without the 2002 letter.

The decedent, who was free to change the beneficiary designation of his IRA to any person, did not take formal steps before death to remove Respondent as beneficiary, such as notifying the custodial entity or completing a new beneficiary designation form. The controlling law in the Second District on the precise issue presented is *Luszcz v. Lavoie*, 787 So.2d 245 (Fla. 2d DCA 2001). In that case, the Court held that the ex-husband was entitled, as a beneficiary, to receive his ex-wife's IRA proceeds upon her death, even though she was disabled at the time, and he had received a portion of the IRA in the divorce. The holding was based on the premise that the husband's IRA rights as a beneficiary arose out of a contract with an institution, not out of the marriage relationship, and the wife's guardian had not changed the

beneficiary. A beneficiary's rights to proceeds do not attach until the IRA owner's death, as until then, the beneficiary merely has an expectancy in the IRA. Until death, the owner can do with the IRA as desired, including changing the beneficiary designation or cashing out the account altogether.

The Court stated that unless the dissolution judgment requires a spouse to name a particular beneficiary as a condition of the dissolution, the owner of the IRA is free to name whomever desired as the beneficiary. Upon the owner's death, the financial institution need look no further than the IRA contract to determine the beneficiary, as otherwise, the institution could never be certain whom to pay and would nearly always have to resort to going to court. In the end, it is the IRA owner's responsibility to change the beneficiary designation if a change is desired.

The Second District, in *Luszcz v. Lavoie*, concluded that the beneficiary designation in an IRA contract controls unless the IRA owner was required to designate a particular beneficiary as a condition of a dissolution of marriage. The court also concluded that the beneficiary designation in an IRA contract controls over that part of an IRA the owner was awarded in a dissolution of marriage, and because an IRA is a contract with an institution, not with a spouse, this holding applies regardless of whether the parties to the dissolution have executed releases.

Luszcz v. Lavoie is completely consistent with existing Florida case law and has been followed by

more recent Florida appellate decisions. For example, in *Smith v. Smith*, 919 So.2d 525 (Fla. 5th DCA 2006), the appellate court held that a former wife was entitled to the proceeds of insurance policies, retirement plans and accounts of which she was the named beneficiary. This conclusion was reached despite the fact that an MSA entered into prior to the dissolution of marriage and incorporated therein identified the various insurance policies and retirement plans. The agreement indicated that "Husband shall receive as his own and Wife shall have no further rights or responsibilities regarding these assets." That language was virtually identical to the "waiver" language in the Bothe MSA. The agreement in *Smith*, just as in the subject case, made no mention of the proceeds of the policies and plans.

In *Waller v. Pope*, 715 So.2d 958 (Fla. 2d DCA 1998) the issue was whether funds contained in a credit union account and pension beneficiary benefits, both listing former wife of the decedent as beneficiary, should go to the wife or pass through the estate of the deceased. The beneficiary designation on each of those assets remained unchanged. There was a general release clause in the property settlement agreement. The court recognized that the decedent could have changed the named beneficiary anytime during his lifetime, because the agreement did not require him to maintain her as a beneficiary on those assets. However, once he died, her rights became established.

Luszcz, *Smith* and *Waller* all rely on the Florida Supreme Court case of *Cooper v. Muccitelli*, 682 So.2d

77 (Fla. 1996) that involved a divorce and an MSA which had a mutual release clause in which each party waived all claims against the other. During the marriage, the former wife was named as primary beneficiary and his sister was secondary on an insurance policy. After the divorce, the former husband left the life insurance policy unchanged. About six months after the divorce, the former husband committed suicide and the ex-wife and the sister filed for the proceeds of the policy.

The Florida Supreme Court concluded that the plain language of the insurance document controlled. To the extent that the former wife may have claimed a right to remain primary beneficiary under the policy as a condition of the dissolution of marriage, she waived any such claim when she signed the agreement with the release clause. As a result, the former husband was free to designate whomever he wished as beneficiary. To determine whom he intended as beneficiary, the Court needed to look no further than the plain language of the policy itself, naming the former wife as primary beneficiary.

Petitioner's position is that the person entitled to the proceeds of the policy is whoever the decedent may have intended it to be, even if not the named beneficiary. It requires little imagination to envision the mischief that would be caused by the adoption of such a rule. Disputes among friends, relatives, and heirs of the decedent would be a regular occurrence. Insurance companies would invariably deposit the proceeds in court because they would be afraid to rely

on their records. The adoption of such a rule would be detrimental to the administration of justice.

There was no evidence presented to dispute that when the MSA was entered into, and prior thereto, Hansen had been designated by the decedent as the primary beneficiary on his IRA account, with Bothe as contingent beneficiary. There was also no evidence presented to dispute that the decedent never communicated to E*Trade that he intended to change his beneficiary, even though he and E*Trade had been involved in other transactions since E*Trade took over Harris*direct*'s accounts. Therefore, the Circuit Court correctly looked no further than the designated beneficiary form to decide this case, and the Second District correctly affirmed that decision, relying on the controlling Florida appellate precedents.

Whether Mr. Bothe may have thought about changing his beneficiary or not does not create an issue of fact as to whether he ever communicated a beneficiary change to E*Trade. It is undisputed that he did not. The trial court correctly applied the rule of *Luszcz v. Lavoie*, 787 So.2d 245 (Fla. 2d DCA 2001) and other Florida precedent in granting Hansen's motion for summary judgment which was properly affirmed by the District Court.

2. The Use of *Per Curiam* Affirmances By Florida's District Courts of Appeal Does Not Result in a Denial of Due Process or Equal Protection of the Laws.

As a reason for granting the Writ, Petitioner argued that Florida's District Courts of Appeal's use of *per curiam* decisions without a written opinion denied her due process and equal protection of the laws. A *per curiam* affirmance is an appellate opinion affirming a trial court's decision but without stating any reason for doing so.

Whittled down to its essence, Petitioner's argument is that because, under Fla. Const. Art. V, §3(b)(3), the Florida Supreme Court's discretionary jurisdiction is limited to appeals from written opinions, the issuance of a *per curiam* affirmance by the District Court denied her a pathway to the Florida Supreme Court. As a result, she argued, she was denied substantive due process and equal protection of the laws. (P. 21-28).

Just as in Argument 1, above, Petitioner failed to comply with Sup. Ct. R. 14.1(g)(i), requiring specification of where and when the federal questions sought to be reviewed were raised, so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. Again, the constitutional issues argued are being raised for the first time therein. In her motion for rehearing, rehearing *en banc*, and for a written opinion directed to the

District Court, Petitioner complained about the *per curiam* affirmance, but raised no federal questions in doing so. She relied on decisions from other state appellate courts in Florida which decided the same state law issues raised by the pleadings in this case, asking the court to find an express conflict with those decisions. She did not argue there was any issue of great public importance. Therefore, this Court should not consider the merits of this constitutional argument as a basis for the exercise of its certiorari jurisdiction. However, even if this Court decides to consider the merits of this argument, it does not present a basis for this Court's review.

In support of her argument, Petitioner asserted that parties before the District Courts are not entitled to demand written opinions which would qualify them for review by the Florida Supreme Court. (P. 22). That is incorrect. Effective January 1, 2003, Fla. R. App. P. 9.330(a), the Florida appellate rule governing motions for rehearing, was amended to add the following language:

> When a decision is entered without opinion, and a party believes that a written opinion would provide a legitimate basis for supreme court review, the motion may include a request that the court issue a written opinion. If such a request is made by an attorney, it shall include the following statement:
>
> "I express a belief, based upon a reasoned and studied professional judgment,

> that a written opinion will provide a legitimate basis for supreme court review because (state with specificity the reasons why the supreme court would be likely to grant review if an opinion were written)."

The case authority cited for the proposition that a party is not entitled to demand a written opinion which would qualify him or her for review by the Florida Supreme Court was decided in 1986, 17 years before the amendment to the rule was adopted. *See School Board v. District Court of Appeal*, 467 So.2d 985 (Fla. 1986).

Petitioner was fully aware of her right to ask the District Court to issue a written opinion after it decided the appeal *per curiam*. Indeed, she filed a motion for rehearing, rehearing *en banc*, and for a written opinion. Counsel for Petitioner included the statement required by Rule 9.330(a), asserting that a written opinion would provide a legitimate basis for Supreme Court review because the District Court's decision conflicted with *Cooper v. Muccitelli*, 682 So.2d 77 (Fla. 1996); *Luszcz v. Lavoie*, 787 So.2d 245 (Fla. 2d DCA 2001); *Waller v. Pope*, 715 So.2d 958 (Fla. 2d DCA 1998); and *Hoffman v. White*, 277 So.2d 290 (Fla. 4th DCA 1973). The cases relied upon by Petitioner in her motion for a written opinion are all Florida state appellate decisions, including one decision from the Supreme Court of Florida. Petitioner's own motion demonstrated that the issues raised by her appeal rested on independent state law grounds.

No federal issue was raised; nor was any issue of great public importance raised.

A *per curiam* disposition affirming a trial court order without a written opinion occurs when the points of law are so well-settled that a further writing would serve no useful purpose. *Elliott v. Elliott*, 648 So.2d 137, 138 (Fla. 4th DCA 1994). It serves as a timely method to announce a correct result in a case where the Appellant has not established that a harmful preserved or fundamental error warrants correction and the case does not have public value as precedent. It also prevents the proliferation of unnecessary case law on settled propositions, and as a result, avoids duplicative opinions and simplifies legal research. *Whipple v. State*, 431 So.2d 1011 (Fla. 2d DCA 1983).

The *per curiam* decision in this case was justified because the points of law raised by Petitioner are well established by the appellate courts in Florida, including the Florida Supreme Court. It does not involve new or unusual points of law.

The Circuit Court properly granted Final Summary Judgment, as it specifically found the holding in *Luszcz v. Lavoie*, 787 So.2d 245 (Fla. 2d DCA 2001) was dispositive of the issues in this dispute. (P. 21a-23a). *See* Argument 1, supra.

After entry of the Circuit Court judgment against Petitioner, she availed herself of the ample opportunities afforded any Appellant in the District Court in presenting arguments and obtaining a fair hearing.

She filed an Initial Brief, a Reply Brief, and requested and appeared for oral argument. She then raised her arguments again in her motion for rehearing and request for a written opinion. The District Court carefully and thoroughly considered the issues raised by Petitioner. There is nothing in Petitioner's arguments that in any way suggests that the decision-making process is different in cases with *per curiam* affirmed opinions as opposed to written opinions. Hence, Petitioner's argument that she was denied a fair hearing and therefore, was denied due process because she received a *per curiam* affirmance is without merit. (P. 24).

Petitioner next argued that the Florida constitutional provision which does not permit review by the Florida Supreme Court where the intermediate appellate court fails to issue an opinion is an unconstitutional denial of access to the Courts. (P. 25-26). Florida's appellate system does not deny meaningful access to the Courts. Like most state appellate court systems, Florida's system has two tiers, five intermediate District Courts of Appeal and the Florida Supreme Court. Like most states, every litigant is entitled to one appeal as a matter of right, but the next tier of review is discretionary. The District Courts are designed to correct error for individual litigants in virtually all cases. Any litigant can invoke appellate jurisdiction for a good reason, a bad reason, or no reason at all. Review after that is done for the purposes of law development, for the benefit of the community at large, as opposed to individuals. In

Florida, the District Courts can certify questions of great public importance to the Florida Supreme Court, a procedure used with regularity. The Florida Supreme Court rarely declines to review a decision certified by a District Court.

In short, the Florida appellate system has procedures in place to ensure that all litigants have an avenue of appellate review, and that the Florida Supreme Court has the opportunity to exercise its discretion and decide cases of public interest, novel questions, undecided points of law, and to maintain uniformity in the law by resolving conflicting appellate opinions. All litigants, whether represented by an attorney or proceeding pro se, are afforded equal access to the courts without financial barriers. *Lingle v. Dion*, 776 So.2d 1073 (Fla. 4th DCA 2001). The argument that the constitution deprives litigants of fair access to the Courts is without merit.

Third, Petitioner argued that *per curiam* decisions without written opinion denied equal protection of the laws by creating two disparate classes of litigants without any legitimate reason for doing so: those who receive written opinions enabling them to seek further appellate review, and those who don't, depriving them of further appellate review. (P. 26-27). This argument is fatally flawed. All litigants are entitled to an appeal as a matter of right. All appeals to the District Courts receive earnest, intelligent, fearless consideration and decision, thus assuring justice to all. Further review is discretionary and to

obtain it, explicit criteria must be met. There is no denial of equal protection when the same terms of appeal are open to all.

Even if the argument that Florida's *per curiam* decision-making creates a discriminatory classification is considered, it is clear that it does not implicate any suspect class, such as race, religion, sex or national origin. Hence, so long as it has a rational justification or reasonable relationship to the achievement of a legitimate government purpose, it is permissible. The requirement of rationality is met as *per curiam* decisions satisfy the judicial system's interest in not issuing written opinions where to do so would have no public value as precedent, would cause unnecessary case law on well-settled issues of state law, and would engender duplicative opinions.

Finally, Petitioner argued that substantive due process was violated by the use of *per curiam* decisions which was asserted to be arbitrary and oppressive. (P. 27-28). Just as in the "equal protection" argument, no fundamental right is alleged to be at stake, and therefore the standard for evaluating a substantive due process challenge is under the rational basis test. Florida's appellate system has a rational relationship to the governmental interest in not issuing written opinions where no public value would be served, avoiding unnecessary case law on well-settled issues of state law, and avoiding duplicative opinions. There are several pathways available to Florida appellate litigants. All litigants have

the same access to the District Courts of Appeal. Even in the absence of a written opinion, the 2003 amendment to Fla. R. App. P. 9.330(a) created an alternative pathway to obtain Florida Supreme Court review. Florida's appellate rules also authorize a litigant to request the District Court to certify questions of great public importance to the Florida Supreme Court. Where cases raise important federal concerns arising from the Constitution, this Court has the ability to review those cases, even in the absence of a written opinion. Therefore, substantive due process was not violated.

CONCLUSION

The ruling by the Circuit Court applied the dispositive state law precedent to the undisputed material facts and came to the correct conclusion. The District Court affirmed the Circuit Court as the points of law raised by Petitioner were well-settled by the appellate courts in the State of Florida. This case does not present an important question of federal law unsettled by this Court or one in conflict with applicable decisions of this Court, or a case otherwise calling for the supervision of the Supreme Court of the United States. For all of the reasons discussed herein, Petitioner has failed to show that the District

Court's decision is worthy of review by this Court. The Petition should be denied.

Respectfully submitted,

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